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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-824

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-825

INSILCO BROADCASTING CORPORATION, ET AL., PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-826

AMERICAN BROADCASTING COMPANIES, INC., ET AL., PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-827

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 610 F.2d 838. The Notice of Inquiry and Orders of the Federal Communications Commission (Pet. App. 60a-116a, 117a-175a, 176a-196a) are reported at 57 F.C.C.2d 580, 60 F.C.C.2d 858, and 66 F.C.C.2d 78.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a-59a) was entered on June 29, 1979. The petitions for a writ of certiorari were filed on November 26, 1979, within the period for filing as extended by the Chief Justice. The petitions were granted on March 3, 1980. This Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the Communications Act of 1934, read in light of the First Amendment, grants to the Federal Communications Commission the discretion to follow a policy of declining to review entertainment program format changes when a radio broadcast license is renewed or transferred.

STATUTES INVOLVED

The relevant portions of the Communications Act of 1934, 47 U.S.C. 151, *et seq.*, are set forth in the Appendix to this brief.

STATEMENT

1. In the early years of radio broadcasting, most radio stations provided diversified broadcast services, presenting a variety of program types or formats throughout the day. In more recent years, radio stations have begun to adopt special program formats, concentrating their broadcasts in areas such as classical music, country music, and all-day news coverage. This format specialization evolved in response to intense competition from television and the growth in the number of radio stations, which have increased from approximately 600 in 1935 to more than 8500 at present.

Since its inception, the Federal Communications Commission has permitted radio stations to select and modify entertainment programming as a matter of business discretion.[1] The United States Court of Appeals for the District of Columbia Circuit has disagreed with the Commission's approach. During the last decade, that court repeatedly has required the Commission to conduct hearings to scrutinize proposed changes in programming when those changes could

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[1] See *Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934* 3 (1935); *Richmond Newspapers, Inc.*, 11 Rad. Reg. (P&F) 1234, 1270 n.13 (1955); *Eastern Oklahoma Television Co.*, 14 Rad. Reg. (P&F) 148, 149 (1956); *Bay Radio, Inc.*, 22 F.C.C. 1351, 1364 & n.16 (1957); *The Good Music Station*, 23 F.C.C. 611, 620-621 (1957); *Programming Policy Statement*, 44 F.C.C. 2303, 2308-2309 (1960); *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 679 (1971).

result in the elimination of a "unique" format. In *Citizens Committee (Atlanta)* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970), the court of appeals set aside a radio station license assignment in view of the assignee's plans to change the station's format from "classical" to "popular" music. Referring to a survey indicating that 73% of the station's listeners preferred the proposed new format, while 16% preferred classical music, the court ruled that the Commission must hold a hearing and take appropriate administrative action to ensure that "all major aspects of contemporary culture [are] accommodated * * * whenever that is technically and economically feasible." 436 F.2d at 269. In imposing this requirement, the court relied not on any specific statutory directive but rather on its own interpretation of Section 310(b) of the Communications Act of 1934, 47 U.S.C. (1970 ed.) 310(b), which states that a radio station license may not be transferred "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 436 F.2d at 268.[2]

In *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973), the court again set aside a license assignment approved by the Commission. The station there involved planned to abandon an allegedly unique "progressive rock" format in favor of "middle of the road music." The court of appeals held, however, that if the abandoned format

[2] Section 310(b) was redesignated Section 310(d) in 1974. See 88 Stat. 1576.

was preferred by some "significant minority" of the public, "it is in the public's best interest to have all segments [of contemporary culture] represented." *Id.* at 929. The court held that a hearing was required on factual issues arising from a proposed format change when "public grumbling reaches significant proportions * * *." *Id.* at 934.

In *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974), the court of appeals, sitting en banc, set aside yet another order of the Commission approving a license assignment that would have resulted in the replacement of a "classical" music format with "contemporary" programming. The court summarized its "format doctrine" as follows:

> When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the

> format itself in order logically to support an assignment that occasions a loss of the format.

Id. at 262. The court added that it is "axiomatic" that a unique format's "preservation * * * is generally in the public interest." *Id.* at 268 . The court based its decision on the general "public interest" standard of Sections 309(a) and 310(b) of the Communications Act of 1934, 47 U.S.C. 309(a) and (1970 ed.) 310(b), and the Commission's authority under Section 303(g) of the Act, 47 U.S.C. 303(g), to "encourage the larger and more effective use of radio * * *." The court did not address the constitutional implications of government regulation of entertainment format selections.

2. Because the court of appeals' format doctrine had developed on an *ad hoc* basis in individual license assignment proceedings, the overriding question of the government's appropriate role in the selection and modification of entertainment formats had never been explored systematically by the Commission. Accordingly, the Commission instituted an inquiry to receive public comment and to provide a record on the factual and policy issues presented. In its January 1976 Notice of Inquiry (Pet. App. 60a), the Commission raised the question whether the government could serve as a better judge than the competitive marketplace in determining what entertainment programming best serves the public interest. The Commission expressed concern that the court of appeals' format doctrine might frustrate rather than stimulate flexible competitive responses to changes in audience listening preferences, might discourage experimentation with unique program formats, and might encourage conformity rather than diversity in programming (Pet. App. 68a-69a). The Commission sought comments on how the format doctrine could be implemented to minimize these difficulties and to protect the First Amendment rights of broadcasters and listeners.[3]

Following public notice and comment, the Commission issued a Memorandum Opinion and Order (Pet. App. 117a-135a), which concluded that the court of appeals' format doctrine was inconsistent with the express terms and policies of the Communications Act of 1934, presented intractable problems of administration, and could not provide any significant increase in program diversity over that provided by competi-

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[3] When the Notice of Inquiry was issued, Commissioner Robinson summarized his view of the "vexing problems" created by the court of appeals' format doctrine (Pet. App. 93a-94a):

> The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections * * * this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions * * *. [B]y the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved. At that thought the mind swims and the heart sinks.

tive forces in the marketplace. In reaching that conclusion, the Commission reiterated the principles expressed by this Court in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940), which emphasized that "the field of broadcasting is one of free competition" and that Congress intended to allow "broadcasters to survive or succumb according to [their] ability to make [their] programs attractive to the public." The Commission added that if "broadcasters are to compete with one another, * * * they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take" (Pet. App. 123a).

The Commission also concluded that competition among broadcasters provides substantial diversity in entertainment programming (Pet. App. 128a). Competitive forces, in the Commission's view, are superior to government regulation in producing programming that satisfies the needs and interests of the listening public. The market provides "a precious element of flexibility which no system of regulatory supervision could possibly approximate" (Pet. App. 131a).[4]

[4] The Commission's conclusions rested in part on a staff analysis (Pet. App. 156a-170a), which found that even formats that are generically similar are not regarded by the public as close substitutes for one another. The staff analysis concluded that, "given the difficulties in defining a meaningful format classification coupled with a total lack of information on the relative values associated with different types of programs," any attempt by the Commission to screen format changes would produce irrational results (Pet. App. 163a-164a). The staff analysis added that Commission regulation of formats would result in less "efficient allocation of entertainment formats than would be obtained if programming decisions were left in the hands of broadcast licensees, who are, after all, far more familiar with listeners' tastes" (Pet. App. 164a). See also J.A. 35-37.

The Commission also noted that the court of appeals' format doctrine would apply to all broadcast applications under Title III of the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, including assignment applications and nearly 3000 annual license renewal applications (Pet. App. 124a-125a). This increased the Commission's practical dilemma in attempting to determine what a station's existing format is, whether there are reasonable substitutes for that format in the market, and, if not, whether the benefits accruing to the public from a format change outweigh the disadvantages of abandoning a prior format (Pet. App. 125a). The Commission expressed serious doubt about its competence to determine whether a radio station's entertainment format is "unique" and whether there are "reasonable substitutes" available (id. at 125a-128a).[5] The Commission added that "[t]here is no way to determine

[5] The Commission pointed out that the court of appeals previously had held that this problem could not be avoided by defining formats broadly. The court has required the Commission to "distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973) * * * [and] to distinguish between 19th Century and 20th Century classical music. [*WEFM*] 506 F.2d at 264 n.28 * * *." (Pet. App. 126a).

the relative values of two different types of programming in the abstract. This is a practical empirical question, whose answer turns on the *intensity* of demand for each format" (Pet. App. 130a). The agency's experience and the record in this proceeding showed that there is no reliable method for measuring the intensity of listener preference, and, as a consequence, no basis for concluding that government screening of format changes would better serve the public interest than unrestrained competition (Pet. App. 130a, 156a-164a; J.A. 36-39, 73-76).

The Commission also concluded that government regulation of entertainment formats unnecessarily infringed the First Amendment rights of both radio listeners and broadcasters. The Commission explained that the threat of administrative hearings, prompted by complaints from listeners who object to a proposed format change, would make the risk of "undertaking innovative or novel programming altogether unacceptable." The Commission added that the prospect of a government-imposed obligation "to continue [allegedly unique] service * * * inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications * * *" (Pet. App. 132a-133a). The Commission also pointed out that enforcement of the court of appeals' format doctrine would abridge the traditional freedom of radio station licensees, replacing managerial discretion with a "'comprehensive,

discriminating, and continuing state surveillance * * *'" (Pet. App. 134a).

3. On petition for review, the court of appeals, sitting en banc, set aside the Commission's Memorandum Opinion and Order, holding that it was "unavailing and of no force and effect" (Pet. App. 40a). The court reaffirmed the basic policy of its format doctrine—that "all major aspects of contemporary culture" should be accommodated by radio broadcasters whenever that is technologically and economically feasible (Pet. App. 5a). Under that doctrine, the Commission must determine whether the public interest permits a renewal or assignment applicant to change its entertainment format (Pet. App. 5a). According to the court, the Commission may approve the application without a hearing only if undisputed facts show that (Pet. App. 24a-25a):

> (1) there is an adequate substitute in the service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable.

In reaffirming its prior format holdings, the court avoided any substantial consideration of the legislative history of the Communications Act of 1934, and likewise dismissed the Commission's First Amendment contentions with the statement that it found "no constitutional impediment" to the format doctrine

(Pet. App. 33a). The court also rejected the Commission's factual determination that it could not do a better job than the marketplace in producing diverse entertainment formats desired by the listening public. The court found more convincing its own "common sense" understanding of the radio marketplace (Pet. App. 37a):

> The common sense of it is that most lovers of disco will switch to another disco station in preference to classical, all-news, country and western or the like. When a unique format is abandoned, those loyal to that format will have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programing the same format.

In a concurring opinion, Judge Bazelon concluded that the Commission's order should be vacated on procedural grounds.[6] Nonetheless, he expressed his disagreement with the majority's "unwillingness to give appropriate deference to the Commission's judgment," and noted that the majority has "virtually confine[d] the FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting" (Pet. App. 41a-42a). Judge Bazelon added that "the Commission's accommodation of the conflicting policy interests is neither irrational nor wholly contrary to the purposes of the Communications Act" (Pet. App. 42a). For this reason, he would not reject the Commission's decision "to cast its lot with the marketplace" (*id.* at 43a), particularly in view of the "'sensitive First Amendment implications' of government oversight of format choice" (*id.* at 42a). Judge Bazelon added that the majority had "fail[ed] to grapple seriously with the constitutional implications of its decision" (*ibid.*).

[6] Judge Bazelon was of the view that respondents improperly had been denied the opportunity to comment on a staff analysis paper prior to its consideration by the Commission (Pet. App. 41a). The majority opinion did not rest on this ground (Pet. App. 17a n.24).

Judges Tamm and MacKinnon dissented, concluding that the majority opinion "usurps the proper role of the [Commission] in the formulation of communications policy" (*id.* at 46a). In addition, the dissent criticized the majority's "lack of deference [to] the Commission's assessment of market conditions" (*id.* at 55a), noting that the majority had (*ibid.*):

> mount[ed] untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's.

The dissenting judges also concluded that the majority had failed to respond to the Commission's demonstration that it could not do a better job than

the marketplace in producing diverse entertainment programming desired by the public at large (*id.* at 53a-54a):

> The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a changed format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a preexisting format. Finally, the majority has failed to identify the principle within the Communications Act that mandates regulation favoring the interests of fewer listeners over the interests of more listeners.

SUMMARY OF ARGUMENT

I.

The court of appeals' format doctrine requires the Commission to scrutinize changes in "unique" entertainment programming and to determine if those changes are permissible when a broadcaster seeks to renew or assign its station license. This requirement is said to be based on the need to achieve optimal "diversity" in entertainment programming. Although disavowing any intention to prescribe communications policy in derogation of the Commission's administrative responsibilities, the court of appeals failed to identify any provision in the Communications Act of 1934 which requires the Commission to regulate entertainment format changes in this manner.

Sections 309(a) and 310(d) of the Act, 47 U.S.C. 309(a) and 310(d), require the Commission, when

passing on applications to transfer or renew a station license, to determine whether granting such applications would be consistent with the "public interest." But Congress did not prescribe that, in discharging this responsibility, the Commission must review the entertainment formats of broadcasters and adjudicate the propriety of their program changes. Because the literal terms of the Act do not compel the Commission to regulate the selection and modification of entertainment formats, the Commission acted within its discretion in determining that diversity in entertainment programming should continue to be pursued, as it has traditionally, through free competition among broadcasters.

Far from requiring the Commission to regulate the content of entertainment programming, the provisions of the Communications Act confirm that such regulation is an inappropriate function. In Sections 3(h) and 326 of the Act, 47 U.S.C. 153(h) and 326, Congress has provided that broadcasters may not be treated as common carriers and has enjoined the Commission not to "interfere with the right of free speech by means of radio communication." These provisions establish that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *CBS* v. *Democratic National Committee*, 412 U.S. 94, 110 (1973). Significantly, the legislative history of the Communications Act of 1934, and its predecessor, the Radio Act of 1927, clearly shows that Congress intentionally declined to require the

Commission to prescribe or prohibit the broadcasting of particular genres of programming. In light of the explicit terms and purposes of the Act, the court of appeals should not have superimposed a form of regulation that stifles the very freedoms that Congress sought to preserve.

II.

Based on a careful examination of the record before it and an application of its administrative expertise, the Commission determined that regulation of programming to preserve "unique" entertainment formats is not feasible. The Commission found that the acute practical problems inherent in format regulation make any possible benefit that could flow from such regulation entirely speculative. Because entertainment programming is a rich composite of elements, it is extremely difficult to classify such programming into "formats" and to determine whether such programming is "unique" or has "reasonable substitutes." As the Commission explained, the elements in radio programs which appeal to listeners "are too fleeting to be caught in the clumsy nets of legal formulations" (Pet. App. 100a). Furthermore, the intensity of listener interest in radio programming cannot be ascertained. For that reason, the Commission cannot rationally determine in any particular case whether the public interest would better be served by adoption of one program format rather than another. Abandonment of a "unique" format and adoption of a "duplicative" format in its place may, in fact, *increase* listener welfare. Finally, the

Commission is not equipped to make the determination, required by the court of appeals, whether a format sought to be abandoned by a broadcaster "might have been" financially viable under efficient station management. As the Commission explained, this is an "almost fantastically speculative point for inquiry" (Pet. App. 127a n.5).

Having reviewed the serious practical obstacles to format regulation, the Commission considered the merits of continued reliance on competition to achieve program diversity desired by radio listeners. The Commission's decision in favor of competition is a classic example of an informed judgment by an agency regarding what is needed to serve the "public interest." The Commission found that, under competitive conditions, program diversity is substantial and that competition permits broadcasters to respond to changes in listener preference with speed and flexibility. In contrast, format regulation, as mandated by the court of appeals, deters innovation in new programming. As the Commission explained: "[u]nder the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable" (Pet. App. 132a-133a). Thus, the court of appeals' format doctrine is counterproductive, actually discouraging unique programming directed to specialized audiences and reducing diversity in the marketplace.

Although, in the absence of government compulsion to preserve format types, a particular "unique"

format may temporarily disappear, free competition permits broadcasters to offer variations *within* format types. When public demand for programming of a particular kind is intense, a station abandoning a unique format can respond to that demand by offering diversified entertainment within the format that is most desired by listeners.

III.

The Commission's consistent interpretation of its statute, which affords broadcasters discretion to adopt and modify entertainment programming, is strongly supported by First Amendment principles. Although broadcasters' freedom of speech is not absolute, serious First Amendment questions would be raised if the Commission were to require a radio station to continue to broadcast an unwanted entertainment format or to revert to a previously abandoned entertainment format. Yet that is what the court of appeals, in effect, has directed the Commission to require. In the view of the court of appeals, if retention of an existing format is in the "public interest," the Commission must generally deny a renewal or assignment application that proposes to change the format. Such a denial would unquestionably restrain the broadcasting of new programming.

In addition to the compulsion that would result if the Commission were to withhold permission to assign or renew a station license based on the program content of the applicant, the format doctrine has a potent

chilling effect. The very existence of a governmental policy of regulating formats chills a broadcaster's willingness to abandon an existing format and inhibits the adoption of new formats. A broadcaster seeking to abandon an allegedly "unique" format faces protracted Commission proceedings if there is substantial "public grumbling." And a broadcaster seeking to adopt a new format that might later be characterized as "unique" runs the risk that the government will compel him to retain it indefinitely. The format doctrine thus serves to "lock" broadcasters into existing programming and diminishes freedom of expression.

Because substantial First Amendment values are threatened by the court of appeals' format doctrine, that doctrine should not be approved unless it is the least intrusive means to achieve the public interest goal. Here, the Commission reasonably determined that the goal of diversity in programming could be achieved through free competition. The Commission was well within its discretion in casting its lot with the marketplace and avoiding unnecessary restraints on expression. See *CBS* v. *Democratic National Committee*, 412 U.S. 94, 127 (1973). Since the Commission's interpretation is strongly supported by both the provisions of the Communications Act and the terms of the First Amendment, the court of appeals should have upheld the Commission's opinion and order.

ARGUMENT

I. THE COMMUNICATIONS ACT OF 1934 DOES NOT REQUIRE THE COMMISSION TO REGULATE RADIO STATION ENTERTAINMENT FORMATS

The court of appeals asserted that its "format doctrine" was not the product of judicial policy-making, but rather was the result of conventional statutory interpretation (Pet. App. 32a-33a). However, the court failed to identify any provision in the Communications Act of 1934 that compels the Commission to regulate purportedly "unique" entertainment formats. In addition, the court essentially ignored those provisions of the Act which enjoin the Commission from interfering with the freedom of speech of radio broadcasters and from imposing common carrier requirements on those broadcasters. Similarly, the court of appeals failed to consider the legislative history of the Communications Act of 1934 and its predecessor, the Radio Act of 1927, which reflects a deliberate congressional decision not to invest the Commission with the duty to regulate entertainment formats.

A. The text of the Communications Act, and this Court's decisions construing it, show that the Commission is not required to regulate entertainment formats

1. Although the court of appeals maintained that its format doctrine expressed the "law of the land as enacted by Congress" (Pet. App. 32a), the court cited no statutory provision that obligates the Commission to oversee the selection and modification of entertainment formats. Instead, the court relied on its earlier "format doctrine" decisions. But those decisions are likewise lacking in any substantial statutory analysis.[7]

The court of appeals' first format decision, *Citizens Committee (Atlanta)* v. *FCC*, 436 F.2d 263, 268-269 (D.C. Cir. 1970), concluded that the Commission must determine in a license assignment hearing whether abandonment of a "unique" entertainment format is permissible. That requirement was said to derive from Sections 309(a) and 310(d) (former Section 310(b)) of the Communications Act of 1934, 47 U.S.C. 309(a) and 310(d), which provide that license assignments may be approved by the Commission if consistent with the "public interest, convenience, and necessity." But these general terms do not, on their face, require the Commission to review format modifications when considering applications to assign a station license. They do not stand in the way of the Commission's reasoned determination that the public interest, convenience, and necessity are, in fact, best

[7] See Polsby, *FCC* v. *National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 Sup. Ct. Rev. 1, 17: "The [format] cases are extraordinary illustrations of a court willing to expand its own function at the expense of the agency's discretion, to make remote inferences of policy from amorphous and general statutory language, and to go beyond mere oversight of the agency's work product to an extended collaborative dialogue with the Commission over what its substantive policies ought to be."

served by avoidance of government interference with the programming discretion of radio broadcasters.[8]

In *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246, 267 (D.C. Cir. 1974), the court of appeals extracted several statements from this Court's opinion in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), to buttress its format doctrine. One such sentence merely reminded that "[t]he public interest to be served under the Communications Act is * * * the interest of the listening public 'in the larger and more effective use of radio.' § 303(g)." But nothing in that sentence or the hortatory language of Section 303(g) of the Act, 47 U.S.C. 303(g), suggests that the "larger and more effective use of radio" must be achieved through Commission regulation of entertainment formats.[9] The general discussion of statutory goals in *National Broadcasting* does not purport to limit the means the Commis-

[8] The court of appeals offered no additional statutory analysis in its next two decisions applying the "format doctrine." See *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973).

[9] Section 303(g), 47 U.S.C. 303(g), provides that the Commission shall "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." In considering that provision, the court of appeals also should have considered this Court's admonition in *National Broadcasting* that judges should not assert their "personal views regarding the effective utilization of radio" in derogation of the Commission's administrative responsibilities. 319 U.S. at 218-219, 224.

sion may employ to further those goals, and offers no justification for the court of appeals' rejection of the Commission's reasoned view that competition, rather than additional regulation, is best adapted to serve "the interest of the listening public."[10]

Because the literal terms of the Communications Act do not require the Commission to regulate the selection and modification of entertainment formats, the Commission acted within its discretion in determining that the goal of program diversity should continue to be pursued, as it has traditionally, through free competition. As this Court repeatedly has determined, free competition is one of the "public interest" values embodied in the Communications Act. See, *e.g.*, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940) ("the field of broadcasting is one of free competition. * * * Congress

[10] The court in *WEFM* also sought to justify its holding by reference to *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953). But that case, dealing with common carrier entry requirements, has little relevance here. See Pet. App. 122a-123a. To the extent that it is relevant, *RCA Communications* supports the Commission's position. *RCA Communications* recognized that a Commission determination resting on the agency's expert "evaluation of the needs of the industry" would be entitled to deference, and that a Commission decision favoring reliance on competition would be upheld if the Commission determined that "competition would serve some beneficial purpose such as maintaining good service and improving it" (346 U.S. at 97). In the present case, the Commission reached that very conclusion based on an extensive administrative record and a fully articulated analysis of the public benefits to be secured through competition (Pet. App. 117a-193a).

intended to leave competition in the business of broadcasting where it found it, to permit a licensee * * * to survive or succumb according to his ability to make his programs attractive to the public"); *CBS* v. *Democratic National Committee*, 412 U.S. 94, 110 (1973) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations"); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (emphasizing the importance of preserving "the journalistic freedom of persons engaged in broadcasting").[11]

2. Far from mandating government supervision of the selection or modification of entertainment formats, the literal terms of the Communications Act of 1934 strongly support the Commission's view that such supervision is inappropriate. As the Commission explained in its opinion below (Pet. App. 119a-123a), the scheme of regulation required by the court of appeals clashes with Section 3(h) of the Act, 47 U.S.C. 153(h), which provides that a radio broadcaster may not "be deemed a common carrier." Section 3(h) prescribes a substantive limitation on the Commission's regulatory authority. See *FCC* v. *Midwest Video Corp.*, *supra*, 440 U.S. at 700-709; *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 105-109. Enforcement of the court of appeals' format doctrine would result in an imposition upon radio broadcasters of obligations analogous to those of common carriers. Common carriers generally may not abandon a unique service offered to the public without prior regulatory approval. See, *e.g.*, 47 U.S.C. 214(a). A Commission requirement that a broadcaster perpetuate a particular entertainment format as a condition to renewing or transferring its license would impose similar restraints on radio broadcasters.[12] As the Commission explained (Pet. App. 122a-123a):

> In contradistinction to the 'obligation, deeply embedded in law, to continue service,' which common carriers must bear, the Communications Act 'recognizes that broadcasters are not common carriers and are not to be dealt with as

[11] The court of appeals also reasoned that, because the Communications Act does not compel broadcasters to pay a fee for access to the public airwaves, the Act, by necessary implication, requires Commission intervention in format selections to maximize broadcaster responsiveness to the tastes of the listeners who own the airwaves (Pet. App. 38a-40a). But it hardly follows from the absence of a spectrum fee that Congress believed Commission intrusion to be necessary or desirable. Nothing in the text of the statute compels the court's interpretation of congressional intent. Moreover, the court's interpretation conflicts with this Court's view that Congress intended to preserve the values of free competition and journalistic discretion.

[12] The court of appeals disregarded economic reality when it asserted that its format doctrine bears no resemblance to common carrier regulation because it does not "obligate[] broadcasters to 'continue in service' * * *" (Pet. App. 26a n.36). It is true, of course, that broadcasters may elect to give up their license rather than continue broadcasting an unwanted entertainment format. However, a broadcaster faced with the choice of continuing an unwanted but economically viable format or surrendering his license is subject to substantial compulsion to perpetuate existing programming.

such.' * * * [B]roadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take. It was through this regime of competition that Congress 'aim[ed] * * * to secure the maximum benefits of radio to all the people of the United States,' * * *.[13]

A Commission decision to condition renewal or transfer of a radio station license on the station's agreement to continue to broadcast an unwanted entertainment format and to abandon a desired new format would also conflict with Section 326 of the Communications Act of 1934, 47 U.S.C. 326. That provision withholds the "power of censorship" from the Commission and states that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." [14] As this Court

[13] The court of appeals' requirement that unwanted but "financially viable" program formats be retained would also impose on the Commission a duty to determine whether the broadcaster is obtaining a "reasonable rate of return" from the existing program format. That is essentially the same determination that the Commission must make in reviewing the rates of return of common carriers. See 47 U.S.C. 201, 203, 204. See also pages 44-45, *infra*.

[14] This provision directly supports the Commission's conclusion that Congress intended the "public interest" standard of the Communications Act to be interpreted with the greatest respect for First Amendment values. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979). The First Amendment implications of the court of appeals' format doctrine are discussed on pages 51-57, *infra*.

repeatedly has held, Section 326 reflects a clear "legislative desire to preserve the values of private journalism." *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 109-110; *FCC* v. *Midwest Video Corp.*, *supra*, 440 U.S. at 704. Section 326 does not, of course, prevent the Commission from reviewing broadcasts to determine if they conflict with specific statutory requirements. See, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 738 (1979) (upholding the Commission's power to review "obscene, indecent, and profane" broadcasts). It does, however, reinforce the view that the Commission exceeds its intended role by foreclosing new programming simply because that programming does not contribute to ideal "diversity" or engenders "grumbling" from certain segments of the listening public. See *FCC* v. *Sanders Bros. Radio Station*, *supra*, 309 U.S. at 475 (Congress did not give the Commission general "supervisory control of the programs" of radio broadcasters).

B. The legislative history of the Communications Act of 1934, supplemented by the Commission's consistent administrative interpretation, confirms that the Commission is not required to regulate entertainment formats

1. The legislative history of the Communications Act of 1934, and its predecessor, the Radio Act of 1927, ch. 169, 44 Stat. 1162, clearly demonstrates that Congress did not intend the Commission to establish public interest priorities for different types of radio

programming.[15] Prior to the enactment of the Radio Act of 1927, Congress gave serious consideration to requiring a federal administrative agency to prescribe "the priorities as to subject matter [program content] to be observed by each class of licensed station." See H.R. 7357, 68th Cong., 1st Sess. § 1(B)(b) and (c) (1924). It was suggested that the government should regulate musical program formats because broadcasters had not given preference to "high class music" and "sacred music" over "jazz." Proponents of such regulation believed that there ought to be "some provision to afford a better and more wholesome set of programs than sometimes exist." See *Radio Communications: Hearings on H.R. 5589 Before the House Comm. on Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37-39 (1926).

When the Radio Act of 1927 was introduced in the House of Representatives, however, the provision authorizing government prescription of radio program content was deleted. See H.R. 5589, 69th Cong., 1st Sess. (1926). The author of the bill, Congressman Wallace White, explained that he deleted the provision "because of the fear which had been expressed by so many to me that that did confer something

[15] The legislative history of the Communications Act of 1934 and the Radio Act of 1927 is reviewed in detail in the decisions of this Court. See *FCC* v. *Sanders Bros. Radio Station*, *supra*, 309 U.S. at 474; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940); *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 103-110; *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 735-738.

akin to censorship." Hearings on H.R. 5589, *supra*, at 39-40. The Senate went further than the House, adopting a specific provision in the bill that barred censorship by the Federal Radio Commission. See *Radio Control: Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926). The final version of the bill that passed both houses of Congress omitted any provision authorizing the Federal Radio Commission to prescribe program content and specifically prohibited program censorship. See H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 16-19 (1927).[16]

When Congress enacted the Communications Act of 1934, it retained the provision forbidding government censorship and guaranteeing freedom of speech (Section 326 of the Act, 47 U.S.C. 326). And it again rejected suggestions that the licensing authority (the Federal Communications Commission) should exercise supervisory power over program content. Thus, a proposal that would have required the Commission to allocate 25 percent of radio broadcasts to educational, religious, agricultural and similar programming was defeated. See 78 Cong. Rec. 8843-8846 (1934). During hearings on that proposal, Congressman White explained:

[16] Section 29 of the Radio Act of 1927, ch. 169, 44 Stat. 1172-1173, the predecessor of Section 326 of the Communications Act of 1934, 47 U.S.C. 326, forbade government "censorship over radio communications" and also prescribed that the government may not "interfere with the right of free speech by means of radio communication."

> At one time, in an earlier draft which I had presented to the House, I did have a direction that the regulatory body should establish priorities as to character of service, but even that was so controversial that it was eliminated from the final draft, and there was a very clear purpose to give no prior rights or preferential recognition to any group or any service.

Federal Communications Commission: Hearings on S. 2910 Before the Senate Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 191 (1934); see also 78 Cong. Rec. 8843-8845 (1934). Rather than requiring radio broadcasters to provide specified kinds of programming, Congress underscored its intent to safeguard broadcaster discretion by enacting Section 3(h) of the Act, 47 U.S.C. 153(h), which provides that "a person engaged in radio broadcasting shall not * * * be deemed a common carrier."

The legislative history of the Communications Act of 1934 and its predecessor statute thus reiterates a continuing theme: Congress wished to preserve the broadest freedom of speech for broadcasters consistent with the public interest, and repeatedly rejected proposals that would empower administrative agencies to prescribe or interfere with the selection of program content.[17]

[17] As we have previously noted, the freedom of speech of broadcasters is not absolute. *FCC* v. *Pacifica Foundation*, *supra*. As this Court cautioned in *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 110, however, "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act." In the present case, the Commission found, after a comprehensive hearing and a careful examination of the issues presented, that the "interests of the public" would be impaired rather than advanced by abridgement of the freedom of expression of broadcasters as required by the court of appeals' "format doctrine." See pages 33-51, *infra*.

2. In construing its own organic statute, the Commission has given effect to the congressional intent by declining to interfere with the discretion of broadcasters in selecting and modifying entertainment formats. In its Memorandum Opinion and Order below, the Commission emphasized that "[f]or over 40 years * * * broadcast applicants have been free to select their own programming formats" (Pet. App. 72a). See also *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960): "the Commission in administering the Act * * * [has] consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment. * * * The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision." See also the authorities cited in note 1, *supra*.

The Commission's consistent interpretation over a forty year period is entitled to deference pursuant to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." *Red Lion Broadcasting Co.* v.

FCC, 395 U.S. 367, 381 (1969); *CBS* v. *Democratic National Committee, supra*, 412 U.S. at 121. This precept applies with particular force under a statute such as the Communications Act which has been amended many times. "Thirty years of consistent administrative construction left undisturbed by Congress" is a compelling indication that the agency has correctly discerned the legislative intent. *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 382. See also *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).[18] In light of the agreement between the Commission's interpretation and the text and history of the Communications Act, this Court's admonition in *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 12, applies with particular force in the present circumstances—"a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views."

As we demonstrate below, the deference traditionally afforded to administrative interpretations is especially appropriate here, since the "format doctrine" fashioned by the court of appeals exceeds the

[18] Congress has continued to reject proposals to amend the Communications Act in such a way that the Commission would be required to prescribe program content or establish program priorities. See 106 Cong. Rec. 17638-17639 (1960). See also *id.* at 17638 (remarks of Sen. Pastore) (the Commission should not be required to give preference to "symphonic music" over "boogie-woogie" music).

bounds of conventional statutory interpretation and intrudes into the domain of administrative policy-making.

II. THE COURT OF APPEALS SUBSTITUTED ITS POLICY VIEWS FOR THOSE OF THE COMMISSION

The decisions of this Court clearly delineate the respective roles of administrative agencies and reviewing courts. Agencies are charged with the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'"[19] An agency may render its judgment based on predictions and accumulated experience in the industry. A "forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

By contrast, the function of the reviewing court is limited. That function is exhausted once it is determined that the agency's decision is rationally based on relevant factors. *Citizens to Preserve Over-*

[19] See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). Put another way, the agency's function is "not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

ton Park v. *Volpe*, 401 U.S. 402, 416 (1971). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion * * *" (*FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946)), particularly when the agency's decision is based on its analysis of public policy, which is "entitled to the greatest amount of weight by appellate courts" (*SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947)).

The Communications Act of 1934 requires the Commission to exercise its administrative authority in the "public interest, convenience and necessity." 47 U.S.C. 301, 303, 309(a), 310(d). That mandate is a "supple instrument for the exercise of discretion by the expert body * * *." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Commission's "public interest" determinations under these statutory provisions are entitled to substantial judicial deference. *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 224. In particular, the proper accommodation of "diversity" and other values inherent in the "public interest" standard presents a delicate question committed to the expert judgment of the Commission. See *FCC* v. *National Citizens Comm. for Broadcasting*, *supra*, 436 U.S. at 803-814.

Based on a full administrative record, the Commission reasonably found that the best method to achieve "diversity" in entertainment formats and to promote the public interest is to leave the selection and modification of entertainment formats—including "unique" formats—to the discretion of broadcasters. While competition for listeners may not perfectly match programming with listener desires at a given point in time, the Commission reasonably determined that consistent reliance on the marketplace is a preferable alternative to periodic governmental intervention aimed at the inherently elusive goal of perfect diversity. The court of appeals should not have supplanted the Commission's reasoned judgment with its own preferred scheme of radio regulation.

A. The Commission reasonably concluded that regulating entertainment formats would present intractable administrative problems

The court of appeals brushed aside the administrative problems created by its format doctrine.[20] Nonetheless, the Commission's Opinion clearly demonstrates that the "acute practical problem[s]" inherent in format regulation render entirely speculative any benefits that such regulation might produce.

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[20] The court sought to characterize the Commission's concern over the problems created by the "format doctrine" as an agency's lament over its workload (Pet. App. 17a-20a). The Commission's concern, however, stems from the injurious effect of the format doctrine on the public interest. As the Commission explained (Pet. App. 131a): "The people are entitled to expect that the broadcast industry will respond to * * * changing tastes * * * without having to endure the delay and inconvenience that would be inevitable if permission to change had to be sought from a government agency, particularly after a full-scale evidentiary hearing."

1. *Formats cannot be classified in a manner that corresponds with actual listener preference*

Under the court of appeals' format doctrine, the Commission is required to analyze the licensee's existing and proposed entertainment formats and to determine whether the change is consistent with the public interest. The Commission must also define and categorize the formats of other radio stations in the local market to determine the extent to which any of those duplicate the format sought to be changed.

The Commission found that this classification process was "highly subjective" (Pet. App. 185a-186a). The "inability of even the most seasoned broadcaster to objectively evaluate a station's programming" is an acknowledged fact in the radio industry. See E. Routt, J. McGrath & F. Weiss, *The Radio Format Conundrum* 4 (1978).[21] Classifying radio broadcasts

[21] As Routt, McGrath & Weiss point out, "[i]t is almost impossible to get two non-associates in radio broadcasting to totally agree on what, for example, a Top 40 radio station is and what makes it altogether different from, perhaps, a station featuring or emphasizing a 'much more music' sound." *Id.* at 4. The court of appeals has never suggested an approach to format classification that is not inherently subjective. See *Citizens Committee (Atlanta)* v. *FCC*, *supra*, 436 F.2d at 265 n.1. Although the Commission's staff relied on a rough delineation of program types or formats (Pet. App. 169a-170a), the staff was careful to point out that its classifications were "subjective * * * [and] by no means fully reflect the breadth and variety of programming available to listeners." The staff added that "any effort to classify formats will be arbitrary" (Pet. App. 160a-161a).

into meaningful "formats" is impractical because each broadcast represents a unique combination of many elements: music type, selection, and placement; announcers, personalities, and guests; news selection, emphasis, and scheduling; placement, number, and quality of commercial and public service announcements; and amount, variety, and scheduling of sports, weather, traffic reports, and specialty features (Pet. App. 127a). See also J.A. 76-91. As the Commission explained, "radio listeners identify in radio formats idiosyncracies which are too fleeting to be caught in the clumsy nets of legal formulations" (Pet. App. 100a). In short, the problem of identifying an entertainment format, determining whether it has changed, and determining whether it is unique, defies principled resolution.[22]

Efforts to classify formats and ascertain whether substitutes exist have necessitated protracted evidentiary hearings. *Citizens Committee to Save WEFM* v. *FCC*, *supra*, is an example. In that case, following remand from the court of appeals, the administrative law judge was required to hear extensive testimony from musicologists regarding dif-

[22] Commissioner Robinson summarized the dilemma (Pet. App. 91a-92a): "Shall a station that bills itself as, say, a 'fine arts' station be deemed to have altered its predominantly classical music format by playing Victor Herbert? One possible answer may be that Beverly Sills' rendition of a Victor Herbert tune is 'fine arts' while Jeanette MacDonald, singing the same selection, is 'easy listening' or 'golden oldies.' * * * How many 'bites' of John Philip Sousa do we permit a classical music station to take?"

ferences and similarities between WEFM's classical programming and that of other stations. The composers, their historical periods, the manner of presentation (including time of broadcast, frequency, "ideological or stylistic clusterings," pairing of composers, and the broadcaster's tendency to be "eclectic" rather than "ideological"), the size of the stations' record libraries, the results of audience surveys, and a host of other factors were dissected by expert and lay witnesses. On the basis of this miscellaneous data, the Commission was expected to determine whether the classical musical programming of the station was "unique." [23]

[23] See *Zenith Radio Corp.*, Docket No. 20581, FCC 76D-47 (Initial Decision, Aug. 30, 1976) at ¶¶ 4-20, 51-60. Arguments have been made to the Commission that "rhythm and blues" is not an adequate substitute for "jazz" (*Riverside Broadcasting Co., Inc.*, 64 F.C.C.2d 866 (1976)), that "beautiful" music is not a substitute for "popular standard" music (*Post-Newsweek Stations, Florida, Inc.*, 57 F.C.C.2d 326 (1975)), that "laid back, progressive" music is not an alternative to "bubblegum rock" music (*SRD Broadcasting, Inc.*, 57 F.C.C.2d 354, 357 (1975)), and that "middle-of-the-road, easy listening" music is not a substitute for "adult contemporary album" music (*McCormick Communications, Inc.*, 68 F.C.C.2d 507, 508 n.1 (1978)). See also Pet. App. 99a (protesting listeners argue that the absence of "loud, fast rock" on a "folk-folk/rock" station makes the station different from other stations that "contain one or more decibel piercing, upbeat rock or jazz selections" in any single hour). The court of appeals has encouraged these contentions by perceiving decisionally significant differences between "classical" and "fine arts" formats (*WEFM, supra*, 506 F.2d at 264-265), between nineteenth and twentieth century classical music (*id.* at 264-265 n.28), and between "progressive rock" and other varieties of rock (*Progressive Rock, supra*, 478 F.2d at 932).

The court of appeals suggested that the Commission could minimize these difficulties by developing "a format taxonomy which, even if imprecise at the margins, would be sustainable * * *" (Pet. App. 29a). But imprecision "at the margins" makes controversial classifications impossible and gives rise to protracted litigation. Inevitably, the Commission will be called upon to justify—and will be unable to justify—strict application of any format classification rule in marginal cases.

The court of appeals also suggested that the Commission could "dispens[e] altogether with the need for classifying formats by simply taking the existence of significant and bonafide listener protest as sufficient evidence that the station's endangered programming has certain unique features * * *" (Pet. App. 30a n.47). Apart from the difficulty of defining what is a "significant" protest in any particular instance, the court's suggestion would be of help only in turning back hearing requests; it would provide no assistance once a case proceeds to hearing. At that stage, the Commission would be required to attempt to analyze the proffered evidence of uniqueness and substitutability.[24]

[24] Format classification involves two questions. Has the station's format been changed? Are there substitutes for the abandoned format? The former question will often involve difficult questions of classification; the latter question almost always will. The Commission will be required to examine the programming of all other stations in the local market and attempt to determine whether their differences and similarities justify a conclusion that they are reasonable substitutes.

2. *The intensity of listener interest cannot be ascertained*

Unrebutted evidence before the Commission established that it is not possible accurately to ascertain the intensity of radio listener interest in particular entertainment formats.[25] In light of this fact, the Commission concluded that it could not rationally determine in any particular case whether the public interest would better be served by adoption of one program format or another (Pet. App. 129a-130a). The court of appeals rejected the Commission's determination by relying on its own "common sense" understanding of the marketplace (Pet. App. 37a). In the court's view, if a program format is abandoned, listeners will turn to a substitute; if no close substitute is available in the market, there will be a loss of "diversity" and the welfare of the public will be diminished. That analysis, however, has no basis in the Communications Act of 1934 and conflicts with the Commission's expert judgment.

Because it is not possible to measure the intensity of listener interest in particular program formats, the Commission cannot, for example, determine whether the loss of a classical format and the replacement of that format with a popular format increases or decreases listener satisfaction. Even though there may be other popular stations in the marketplace and no other classical station, a new

[25] This finding was supported by the Commission's staff analysis (Pet. App. 156a-170a), and by expert testimony presented to the Commission (J.A. 31-37).

popular station with different announcers, a novel arrangement of music, or a different blend of music and news broadcasts, may increase overall listener satisfaction. The intensity of public demand for diversified programming within the popular format may substantially outweigh the intensity of demand for the classical format.[26]

In short, the court of appeals' insistence on its own goal of perfect "diversity" could diminish rather than increase aggregate listener welfare. This, of course, is not an unlikely inference, since a change in program format in a competitive marketplace represents a flexible response by radio station management to perceived changes in listener demand. For that reason, as the dissenting judges in the court below pointed out, the format doctrine "calculates the public interest without necessary reference to the aural desires of the greatest number of listeners" (Pet. App. 50a). Because the Commission cannot meaningfully measure the intensity of listener interest in particular formats, it reasonably cast its lot with the marketplace. As it explained, "unless we were to favor regulation for its own sake, it

[26] Because intensity of preference is not subject to measurement, the number of listeners who prefer a particular format is not decisive. As the dissenting judges in the court below pointed out (Pet. App. 53a): "If twenty percent of the listening audience would mildly prefer a second top 40 format and five percent would vigorously prefer retention of the classical format, does the size of one audience outweigh the intensity of preference of the other? The majority opinion offers no clue."

would be hard to justify rules which for all we know may do more harm than good" (Pet. App. 183a).

Nor is it feasible for the Commission to attempt to assess public satisfaction with format changes based on listener "grumbling." The court of appeals, in offering that suggestion, ignored the difficulties the agency would face in tailoring an assessment of public protest to markets of different sizes and compositions and in ensuring that the "grumbling" reflects an actual preference for existing over proposed formats. See J.A. 30-31. As the dissenting judges in the court of appeals recognized (Pet. App. 50a), a Commission "referendum" whenever a radio station seeks to modify its format would hardly be "practicable" in the dynamic radio broadcasting industry.[27]

[27] The court of appeals referred to the survey of listeners in *Citizens Committee (Atlanta)* v. *FCC*, *supra*, to support the proposition that "16% of the listeners [in Atlanta] preferred classical music" (Pet. App. 36a n.52). This survey, in the court's view, showed that the market failed to accommodate the interests of a substantial group of listeners. In fact, however, the survey merely showed that 16% of the persons contacted preferred a blend of opera and ballet music to a blend of Broadway show tunes and movie tunes. *Glenkaren Associates, Inc.*, 19 F.C.C.2d 13, 14 (1969). The court's suggestion that this survey showed that the Atlanta market was failing to respond to listener tastes is wholly mistaken. If, in fact, a classical music format attracted 16% of Atlanta's radio listeners, the station broadcasting that format would almost certainly have more listeners than any other station in the market. (Recent surveys show that none of the 23 stations in the Atlanta market currently attracts more than 15.3% of the listening audience. The one station currently broadcasting classical music attracts only 1.3% of listeners. See J. Duncan, *American Radio*, Vol. IIII, No. 1 (1979)). The fact that the classical format in question in the *Atlanta* case was being abandoned is a clear demonstration that it did *not* attract 16% of the listeners.

The absence of any reliable indicator of the intensity of listener interest makes it impossible for the Commission to weigh the relative public interest values of a unique and non-unique format, or of two unique formats. When a unique format is replaced by a duplicative format, there may be a loss in diversity but an increase in overall listener satisfaction.[28] The Commission has no way to second-guess the broadcaster in determining whether such a change responds to listener demand. Similarly, when a unique format is abandoned in favor of another unique format, the Commission has no basis for determining whether there has been a net gain or loss in listener welfare. In these circumstances, intervention by the government threatens the freedom of radio broadcasters with no discernible benefit to radio listeners.

[28] The court of appeals has stated that, in this situation, it is "axiomatic" that the public interest will be served by perpetuation of the existing format. *Citizens Committee to Save WEFM* v. *FCC*, *supra*, 506 F.2d at 268. The decision below, however, suggests that while loss of a "unique" format is presumptively undesirable, other countervailing factors may also be considered (Pet. App. 25a, 31a-32a, 37a). Suffice it to say, the Commission has no calculus to ascertain comparative listener satisfaction in such a situation.

3. *A finding of financial viability would be entirely speculative*

The court of appeals' format doctrine also requires the Commission to determine if a unique format proposed to be abandoned is financially "viable." It may be abandoned, according to the court of appeals, "if the format itself is * * * economically unfeasible in the particular market—*i.e.*, if even an efficiently managed station would have no realistic prospect of economic viability * * *" (Pet. App. 6a). See also *Citizens Committee to Save WEFM* v. *FCC*, *supra*, 506 F.2d at 265-266. The Commission properly characterized this as "an almost fantastically speculative point for inquiry," since the court would require the Commission to determine not whether the station had in fact been financially viable, but whether it *might* have been viable under hypothetical circumstances (Pet. App. 127a n.5).

The court of appeals offered no assistance in defining "viability." That term may imply a reasonable rate of return on investment. If so, to determine a format's "economic viability," the Commission would first have to decide what constitutes a reasonable return on investment in a particular broadcast market.[29] Next, it would be required to decide whether an "efficiently managed" station would have a "realistic prospect" of achieving that

[29] Proponents of format regulation have urged such an approach (C.A. App. 414-415; see also *id.* at 216-219). Profitability varies, of course, from year to year and from local market to local market.

rate of return with a particular "unique" format. Finally, if the Commission were to find that a well-managed station could achieve a reasonable rate of return while retaining the format, the format doctrine would ordinarily require that the format be retained.

The Commission properly rejected a regulatory role that would require it to examine the licensee's financial affairs, to make conjectures about its profitability under hypothetical conditions, and to dictate continuance of unwanted programming. It correctly concluded that this kind of regulation would convert the licensee into a common carrier in violation of Section 3(h) of the Communications Act, 47 U.S.C. 153(h). See pages 24-26, *supra*.[30]

B. The Commission reasonably concluded that competition, rather than regulation, produces diversity in entertainment broadcasting desired by the listening public

Having examined the many pitfalls to administrative regulation of entertainment formats, the

[30] Those witnesses who urged the Commission to adopt a policy of format regulation recognized that the doctrine entails "common carrier" obligations. See Comments of United Church of Christ (C.A. App. 341), arguing that determination of financial viability "is a task which rate regulating bodies perform every day in the week. The Commission exercises similar responsibilities in regulating common carriers * * *." See also Comments of Frank Kahn (*id.* at 363): "Broadcasting is most properly to be regarded and regulated as a quasi-utility." Needless to say, this philosophy directly contradicts the decisions of this Court which establish that the field of broadcasting is one of free competition. See page 27, *supra*.

Commission considered the merits of continued reliance on free competition in achieving the program diversity desired by radio listeners. The decision in favor of competition is a classic example of an informed judgment by an administrative agency regarding what is best suited to serve the "public interest." Contrary to the suggestions of the court of appeals, the Commission did not "simply throw up its hands" or cast off its statutory responsibilities (Pet. App. 28a). Rather, the Commission affirmatively found that the free functioning of the marketplace would better serve the public interest than governmental regulation. This is true because free competition encourages rather than stifles innovation in programming and because competition allows listeners to obtain desired diversity within entertainment formats.

1. *Government regulation stifles innovation that occurs under competitive conditions*

While the Commission recognized that the marketplace is not a "completely faithful" mirror of listening preferences, it nonetheless found that reliance on competition is "the best available means of producing the diversity to which the public is entitled" (Pet. App. 128a). The Commission noted that there is no evidence that the entertainment tastes of substantial groups of listeners have been ignored under competitive conditions (*id.* at 182a), and that competition produces "program diversity of a sort, and in a form, that equates both to the welfare of radio

listeners and to the public interest generally" (*id.* at 124a). The Commission also determined that "allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate" (*id.* at 131a). That flexibility permits broadcasters to respond quickly to changes in listener tastes (*ibid.*).[31] The conclusion of the court of appeals that "breakdowns" in competition prevent listeners from enjoying programming that they prefer rests on no factual record and disagrees with the Commission's experience and the evidence presented in this proceeding.

The Commission also found that regulation of format changes would discourage innovation and experimentation by "locking" stations into existing programming. Pet. App. 129a-132a. The chilling effect on program innovation is not difficult to identify.[32]

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[31] Compare *New York City Fever: Disco Sound Propels WKTU to the Top*, Wall St. J., Jan. 26, 1979, at 1, col. 4, with *Disco-Music Craze Seems to be Fading; Record Makers Glad; Radio Stations Drop Format or Vary Their Programs*, Wall St. J., Oct. 22, 1979, at 1, col. 4.

[32] *Citizens Committee to Save Progressive Rock* v. *FCC*, *supra*, provides a useful illustration. The broadcaster in that case had experimented with a series of different format types, found none to be successful, and agreed to sell its station. While awaiting Commission approval, it experimented with yet another format. When it became known that the buyer did not intend to continue that format, listeners filed protests with the Commission and sought to block the sale. The court of appeals required a hearing to determine whether loss of the experimental format was in the public interest. It is obvi-

The prospect of substantial regulatory burdens is an ever-present risk for a broadcaster who cannot know in advance whether a future format change will arouse public "grumbling," whether his assessment of "financial viability" will be challenged, or whether an agency or reviewing court will classify his programming as a "unique format" and require its continuation. These problems are intensified when a broadcaster experiments with specialty programming—programming designed to appeal to limited ethnic or cultural groups, or audiences desiring "all news" or "all talk" shows. Such programs are high risk ventures; they entail large expense and appeal to narrow audiences. The threat of expensive legal proceedings or an administrative order requiring perpetuation of such programming is a compelling disincentive.[33] In short, the court of appeals' format doctrine is counterproductive, actually discouraging unique programming directed to specialized audiences, and thus *reducing* available diversity in the marketplace. As the Commission explained (Pet. App. 132a-133a):

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ous that a similarly situated station would be deterred from experimenting with new formats if it faced the threat of protracted litigation or an order from the Commission requiring it to continue an unwanted format.

[33] One of the expert witnesses who provided testimony in this proceeding noted that it "is doubtful whether such relatively recent innovations as the 'all news' format could have arisen under the WEFM rule" (J.A. 33).

> Under the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable. Several commenting parties mentioned this effect, and we regard it as of great importance.[34]

2. *Competition permits broadcasters to diversify programming within formats as desired by listeners*

The Commission also found that unregulated competition in the marketplace permits listeners "to give a rough expression of whether their preference for diversity *within* a given format outweighs the desire for diversity *among different formats*" (Pet. App. 129a; emphasis in original). The Commission explained (*ibid.*):

> [W]ith respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of * * * formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations,

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[34] The court of appeals largely ignored this issue, stating simply that the Commission could deal with the "lock-in" problem created by the format doctrine by adopting rules "exempt[ing] from the hearing requirement formats adopted experimentally and sought to be abandoned after a very short period of time" (Pet. App. 31a). That, however, simply adds another layer of regulation and ignores the reality that public acceptance of a new program often requires a substantial period of development.

there would be no reason for them to co-exist—and little economic likelihood that they would.

In contrast to the court of appeals' presumption that the public interest can only be served by compulsory proliferation of formats, the Commission recognized that diversification within format types is also in the public interest (Pet. App. 128a-131a; 99a-103a). The Commission added that "efforts to maximize format diversity through regulatory fiat could very well result in a diminution of consumer welfare; a format protected under the WEFM rationale may be of lesser value than the format which the broadcaster proposes to substitute" (Pet. App. 130a). Thus, rather than compelling broadcasters to perpetuate programming labelled by the government as "unique," the Commission's approach allows broadcasters vigorously to compete in providing listeners with variations of popular programming which they desire.[35]

In sum, the Commission expressed a reasonable basis for its determination that free competition produces entertainment programming best adapted to the changing tastes and interests of the listening public. Under familiar principles of administrative law, the court of appeals should have upheld that determination.

[35] Abandonment of a program format by a broadcaster in a competitive market does *not* mean that the format is lost forever. Experience demonstrates that formats are frequently re-adopted shortly after abandonment. "The Commission's accumulated experience indicates that licensees frequently shift and modify their entertainment formats in response to changing listening tastes, competition, and financial necessity. Frequently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format. This view has been borne out in two previous format change cases in which the 'gap' left by Commission approval of a change of format was quickly filled by another station serving the same area" (Pet. App. 68a).

III. FIRST AMENDMENT CONSIDERATIONS MILITATE AGAINST UNNECESSARY REGULATION OF PROGRAM FORMATS

First Amendment principles strongly support the Commission's view that it should not undertake to regulate the content of entertainment programming. See Pet. App. 71a-72a; 132a-134a; 185a-189a. Despite the content-oriented nature of format regulation, the court of appeals has refused to "grapple seriously with the constitutional implications of its decision" (see concurring opinion of Bazelon, J.: Pet. App. 42a). In dismissing the Commission's concerns over the First Amendment consequences of format regulation, the court failed to heed this Court's admonition that the expert views of the Commission on First Amendment issues arising in the field of broadcasting are entitled to "great weight." *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 102.

1. The First Amendment rights of broadcasters differ, of course, from those of participants in other communications media. Compare *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), with *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). In the limited broadcast spectrum, it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

Nevertheless, this Court has confirmed that broadcasters are entitled to exercise "the widest journalistic freedom consistent with [their] public obligations." *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 110. And no court has ever held that the Constitution permits the Commission to foreclose conventional entertainment programming or to dictate what may be broadcast. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396; *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 480 (2d Cir. 1971).[36]

2. The court of appeals' format doctrine requires that, in at least some instances, the Commission must interfere with the broadcaster's selection of programming because the public interest would be "better served" by some alternative programming. As Judge Bazelon noted, "regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over

[36] *FCC* v. *Pacifica Foundation*, *supra*, upheld Commission sanctions based on an explicit statutory mandate (18 U.S.C. 1464), when a broadcaster repeatedly carried indecent programming in the afternoon hours. Justice Powell emphasized in his separate opinion in that case that "I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." 438 U.S. at 761. The court of appeals' format doctrine requires just such a valuation, affording substantial protection to entertainment programming which is "unique" and denying protection to programming which is "duplicative."

others" (Pet. App. 42a). The court of appeals' assertion that, under the format doctrine, the Commission does not "interfere with licensee programming choices" or "force retention of an existing format" (Pet. App. 25a-26a) is inexplicable and at odds with prior assertions of the court (see page 6, *supra*).[37] The court's statement that the agency need only take a station's format change "into consideration in deciding whether to grant certain applications" (Pet. App. 25a) is misleadingly benign. If, as the court has repeatedly stated, the retention of a "unique" format is in the public interest and adoption of a new format is not, then the Commission must, under the court's analysis, refuse to grant applications which would reduce program "diversity."[38] To do

[37] The court of appeals itself has exercised such powers on an interlocutory basis. In *Citizens Committee to Save WEFM* v. *FCC*, *supra*, the court effectively required the broadcasting of a specific type of program when it permitted the assignee to obtain the license in dispute pending the outcome of the case *only* upon the condition that the assignee continue to broadcast the classical music format that it wished to abandon. *Citizens Committee to Save WEFM* v. *FCC*, No. 73-1057 (D.C. Cir. Apr. 23, 1973). Compulsion to retain that unwanted format remained in effect for nearly two years while litigation was pending before the court, and for over three additional years while the agency conducted an administrative hearing on remand. See *Zenith Radio Corp.*, Docket No. 20581, FCC 76D-47 (Aug. 30, 1976) (initial decision on remand); *Zenith Radio Corp.*, 42 Rad. Reg.2d (P&F) 472 (1978) (order approving settlement and terminating proceeding).

[38] In its decision below, the court of appeals admonished the Commission that it could not "administer the format cases as a dead letter." The court added that the Commission must

so, however, would unquestionably restrain the broadcasting of new programming and threaten the First Amendment rights of broadcasters.[39]

The format doctrine also discriminates against certain categories of listeners in a manner that raises serious First Amendment questions. The court of appeals would apparently accord little or no significance to the listening preferences of those who would prefer new programming proposed by a broadcaster who seeks to abandon a unique format. See Pet. App. 130a, 134a, 190a-192a. The Commission properly rejected a regulatory role that would require it to favor the programs desired by one group of listeners while ignoring the preferences of other groups. In this respect, the Commission's decision agrees with this Court's observation in *Red Lion* that it is the rights of viewers and listeners "as a whole" that are paramount, not the rights of particular segments of the listening public. 395 U.S. at 390.[40]

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be alert to "rectify" situations in which the market has "failed"—situations in which "the public interest would not be served by granting the [broadcaster's] application" (Pet. App. 31a-32a).

[39] The court's unelaborated statement that the Commission may also consider "other factors bearing on the public interest" in addition to the factor of lost format diversity (Pet. App. 5a) may leave the Commission some discretion to approve an occasional application. But the court's statement does not eliminate the conduct-restraining thrust of its format doctrine.

[40] The court of appeals in *WEFM* stated that Commission oversight of non-entertainment formats implies that format

3. In addition to a degree of compulsion in the court of appeals' format doctrine, there is an element of deterrence which threatens First Amendment rights. The existence of a policy of format regulation significantly chills a broadcaster's willingness to abandon an existing unique format and inhibits innovation in new formats.[41] See pages 46-49, *supra*. This chilling effect is intensified by the inherent vagueness of format analysis. See pages 36-39, *supra*.

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regulation is consistent with the First Amendment. 506 F.2d at 267. The Commission does require ascertainment of the non-entertainment needs of the public and does maintain guidelines encouraging a minimum amount of news and public affairs programming. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C. 2d 418 (1976); 47 C.F.R. 0.281(a)(8). In radio, the need for such regulation is currently subject to reexamination. See *Deregulation of Radio*, 73 F.C.C. 2d 457 (1979). The Commission's requirements in the field of non-entertainment broadcasting are far less intrusive than the court of appeals' format doctrine. The Commission has never required a station to justify its change from one news or public affairs format to another, and has not attempted to prescribe the content of such broadcasting. Moreover, in contrast to the court of appeals' format doctrine, the Commission's requirements relate only to a narrow portion of the broadcaster's total programming. As the Commission explained (Pet. App. 187a-188a): "These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day."

[41] The Commission anticipated that this would affect most severely potential new owners of broadcast stations and prospective licensees of limited financial means. Such persons, including minority groups within the community, would have limited ability to meet the cost of format litigation (Pet. App. 185a).

The Commission correctly concluded that the elusive and subjective standards inherent in format regulation underscore the desirability of relying on competition rather than regulation to achieve diversity. As this Court observed in *FCC* v. *National Citizens Comm. for Broadcasting*, *supra*, 436 U.S. at 796-797, "[d]iversity and its effects are * * * elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."

The chilling effect of format regulation is also intensified by the continuing agency oversight that attends it. The Commission would be required to adjudicate complaints that a broadcaster had in practice varied from programming that he promised to present when his license was obtained or renewed. The Commission would thus intrude further into the day-to-day operations of broadcasters than was required under the access scheme mandated by the court of appeals and set aside by this Court in *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 126-127. See Pet. App. 107a-108a, 133a-134a, 186a-189a. In *CBS*, the intrusion was limited to a particular aspect of the licensee's programming—editorial advertising. Here, by contrast, the Commission's role would extend to the station's entire program schedule and involve a "comprehensive, discriminating, and continuing state surveillance * * *" (Pet. App. 134a).

4. In light of the substantial First Amendment values at stake, the legitimate objective of program

diversity should be pursued through means that are the least intrusive. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). As the Commission found in this case, the least intrusive method to achieve program diversity is free competition. It is ironic that the court of appeals' format doctrine not only is *more* restrictive of broadcasters' First Amendment rights than free competition, but also is *less* likely to achieve an equivalent level of diversity. As this Court emphasized in *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 127, "[t]o sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result." Here, the sacrifice of First Amendment rights resulting from enforcement of the format doctrine would be at least as great as in *CBS*. And the public interest gain would be even more speculative, since any theoretical increase in "diversity" would be offset by a diminution of competition within format types and a significant loss of program innovation.[42]

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[42] Rather than attempting to compel diversity through regulation of program content, the Commission has sought to encourage diversity through structural reforms. For example, the Commission has adopted policies to increase minority employment in the broadcast industry and to increase minority ownership of broadcast facilities. See *Non-Discrimination in Employment Practices*, 60 F.C.C.2d 226 (1976); *Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978). The Commission has also sought to expand the frequency space available for radio broadcasting to make channels available for more broadcasting stations. See *Availability of*

In sum, the Commission's First Amendment concerns are substantial and strongly support its determination that competition, rather than regulation, is the preferable means for achieving diversity in entertainment programming.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1980

Commercial FM Broadcast Assignments, 45 Fed. Reg. 17602 (1980); *AM Channel Spacing*, 44 Fed. Reg. 39550 (1979); *World Administrative Radio Conference Proposals*, 70 F.C.C.2d 1193, 1211-1214 (1979); *Clear Channel Stations*, 40 Fed. Reg. 58467 (1975), 44 Fed. Reg. 4502 (1979).

APPENDIX

Relevant portions of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*, are reproduced below:

Section 3(h), 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 303(g), 47 U.S.C. 303(g), provides:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * * * *
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 309(a), 47 U.S.C. 309(a), provides:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon con-

sideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 310(d), 47 U.S.C. 310(d), provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326, 47 U.S.C. 326, provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 402(b), 47 U.S.C. 402(b), provides:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

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